

MONTANA PUBLIC DEFENDER COMMISSION

Minutes

Montana State Capitol Building, Room 172A
Helena, Montana

July 27, 2007

(Approved at the September 7, 2007 Commission Meeting)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:40 a.m.

Commissioners Present

Betty Bichsel, Edgar; Dan Donovan, Great Falls; Vic Miller, Harlem; Stephen Nardi, Kalispell; and James Park Taylor, Missoula. Jennifer Hensley, Butte, joined by teleconference.

Commissioners Absent

Mike Sherwood, Missoula; Caroline Fleming, Miles City; Tara Veazey, Helena; Wendy Holton, Helena; and Ivan Small, Poplar

Interested Persons

Pat Gervais, Legislative Fiscal Division; Brent Doig, Office of Budget and Program Planning; David Ewer, Budget Director; Sherry Heffelfinger, Legislative Services Division; Jennifer Erdahl, Legislative Audit Division; Dr. Patrick Davis, private practitioner; Dr. Michael Bütz, Aspen Practice P.C.; John Wilkinson, National Association of Social Workers, Montana Chapter; Tim Conley, University of Montana School of Social Work

Approval of Minutes from the June 20, 2007 Meeting

Commissioner Bichsel moved to adopt the minutes as submitted. Commissioner Donovan seconded the motion. The motion carried.

Commission/Committee Items

Election of Officers

The Chair and Vice Chair are elected for one-year terms. Chairman Taylor and Commissioner Nardi expressed willingness to continue in their respective positions. Commissioner Donovan moved to nominate Chairman Taylor as Chair and Commissioner Nardi as Vice-Chair. Commissioner Bichsel seconded the motion. The motion carried.

Review of Committees and Membership

The Legislative Committee did a great job during the session. The Budget Committee is expected to be less active during the interim. The union contract expired June 30, so the Collective Bargaining Committee will be gearing up again. The IT Committee will also have more work in the future. The Caseload Standards Committee hopes to benefit from information Chief Public Defender Randi Hood plans to bring back from the American Council of Chief Defenders' National Caseload Reform Summit in late August. The Grants Committee plans to meet before the October Commission meeting.

The following changes to committee membership (exhibit 1) were made:

Commissioner Miller joined the Budget, Collective Bargaining and Personnel committees. Chairman Taylor joined the Collective Bargaining and Contracts Process and Approvals committees.

Commissioners Hensley and Small left the Collective Bargaining committee.

A new committee listing will be posted to the website.

Standards – General Discussion

The final Standards have been printed, distributed to OPD offices, and posted to the website. Commissioner Donovan commented that he hasn't heard any complaints regarding the Standards, and wondered if Chief Hood has been getting feedback. Chief Hood replied that the union has asked how closely members must adhere to the Standards. She is working with some of the offices to help improve their procedures in regard to timely client contact.

Public Comment

No public comment was offered at this time.

Commissioner Donovan requested a new standing agenda item, "Input from Contract Attorneys." The Commission agreed.

Reports

Chief Public Defender Report

- *Public Defender Program Update*

Chief Hood reported that a handful of new FTE attorneys recently took the bar. They will be put to good use in Kalispell, Great Falls, Helena and Billings until the bar results are released in October (exhibit 2).

Chief Hood has been spending a lot of time in the field to assess caseloads and see how contractors are being used. She is also trying something new, following a suggestion by Senator Shockley at the July meeting of the Law and Justice Interim Committee. Three "rovers," based in Billings, Missoula, and Boulder, will serve busy locations that don't have a public defender office. The Missoula rover will also handle conflict cases in Polson and Hamilton under the supervision of Eric Olson. The Billings rover will do conflicts for Region 7 under the supervision of the Region 9 Regional Deputy Public Defender. Chairman Taylor asked for a report on inter-region conflict coverage to present to the Law and Justice Interim Committee.

The budgeting process is almost complete. It has been valuable for the regional offices and for the Central Office to identify issues and see how things work across the state. Chief Hood and Administrative Director Harry Freebourn will finalize the individual budgets within the next couple of weeks, and then will meet again with each region to discuss the final budget.

Chief Hood is beginning to work on performance evaluations. She stated that client feedback on the quality of public defender services received is important, so random postcards soliciting comments will be sent to incarcerated clients beginning in late August. Chief Hood is still working on the process, trying to determine how to overlay

Central Office oversight with what the regional people are doing. Evaluating approximately 300 FTE and contract public defenders will be a continuous process.

This week the U.S. Senate passed the Higher Education Act including a proposal by Senator Dick Durbin to create a student loan repayment program for law school graduates who commit to serve as criminal prosecutors or public defenders for a minimum of three years. This will have a significant impact on OPD employees, many of whom graduate with \$50,000 or more in student loan debt.

Chief Hood plans to meet with the regional deputy public defenders in Butte on August 8. On August 22 she will travel to San Francisco for the American Council of Chief Defenders meeting. The sole topic will be caseloads; approximately half of the states are expected to be represented and she hopes to come back with some good information.

Policies and Procedures

The Conflict Cases policy (exhibit 3) was reviewed at the last Commission meeting and the suggested changes were made. Chairman Taylor asked that a process be developed for FTE public defenders who think they have a conflict, including next steps if they disagree with the regional deputy's decision. There was discussion regarding whether section 2.3.3 of the Conflict Cases policy should be added to the Standards.

A draft Caseload Management policy (exhibit 4) was presented. Chief Hood wants to identify the issue for the offices, and to focus on shifting caseloads instead of adding staff. She expects the policy to change in response to the work of the Caseload Standards Committee. This policy is subject to union review. The Chief will also develop a policy asking contract attorneys to share general information regarding their private caseloads so that can be monitored as well.

Commissioner Miller moved to approve the two policies as amended. Commissioner Bichsel seconded. The motion carried with Commissioner Donovan opposed.

Reports, continued

- *2007 Biennium Results of Operation*

Mr. Freebourn presented the un-audited fiscal year-end reports (exhibit 5). Chief Hood applauded the efforts of OPD staff statewide for their cost-saving efforts at the end of the fiscal year. The year-end report shows that personal service costs were close to estimates provided in the strategic plan. There were significant savings in the "other" and "one-time costs" operating expense categories. Those are areas that OPD can control, unlike the "outside services" category, which is difficult to control and predict. Fiscal year closing accounting accruals for contract services were estimated using an 11 month average. Unfortunately, several claims were received in July 2007 from vendors billing for the entire July 2006-June 2007 fiscal year, so the estimate may prove to be low. Staff will keep the Commission apprised of this situation.

Upon reviewing the detail of contracted services and noting that except for contract attorneys the cost for mental evaluations is by far the greatest contracted services cost, Chairman Taylor asked what the cost of a full-time clinical psychologist would be. Mr. Freebourn estimated that the cost would be approximately \$85,000 per year

including benefits, and guessed that four or more FTE would be needed to provide that service in-house.

Mr. Freebourn thanked Brent Doig and the staff of the Governor's office for their help in closing fiscal year 2007, as well as OPD Financial Manager Sandra Law and her staff.

- *2009 Biennium Detailed Budget*

Mr. Freebourn reviewed the funding for the 2009 Biennium (exhibit 6). He noted that there are no one-time expenditures allocated for this biennium; JustWare costs will come out of operating expenses. The State Special Revenue line item relates to fees collected (estimated at \$75,000), but the expenditures can't exceed the amount actually collected. The Bills Passed – New Work expense was appropriated by the Legislature to cover the anticipated increase in caseload due to expansion of the statute of limitations in sex offenses, and costs related to the “Jessica Bill” (mandatory sentencing) and the mediation of cases bill, which requires OPD to pay all costs, rather than sharing costs with the prosecution. The line item to increase the hourly rate for contract attorneys from \$60 to \$70 per hour was eliminated by the Budget Office.

- *Legislative Committee Issues*

Sheri Heffelfinger, Legislative Services Division Research Analyst, distributed the Law and Justice Interim Committee's Adopted Work Plan (exhibit 7). Senator McGee chairs the Committee. Ms. Heffelfinger reviewed the plan of work and the meeting schedule. She expects OPD to be involved in HJR 50 (pre-commitment psychiatric evaluations) and SJR 6 (juvenile justice system). The November 8 meeting will include a round table with the Public Defender Commission. Chairman Taylor said the Commission is looking forward to working with the Law and Justice Interim Committee during the biennium.

Pat Gervais, Legislative Fiscal Division (LFD) Senior Fiscal Analyst, distributed three handouts (exhibits 8, 9, 10) all of which are also available on the LFD website, <http://leg.mt.gov/css/fiscal/lfc.asp>. Senator Schmidt chairs the Legislative Finance Committee; Representatives Taylor and Sesso are OPD's bulldogs. Ms. Gervais described the investigative and oversight powers of the Committee, noting that monitoring OPD system financing is a high priority item in the Committee's work plan for the interim. Chairman Taylor said that he would appreciate any comments Ms. Gervais might offer later in the meeting as the Commission works to control costs while providing superior service.

Jennifer Erdahl, Legislative Audit Division, distributed a Legislative Audit Committee handout (exhibit 11). There are nine new members on the Committee, and a chair has not yet been determined. The audit team will begin planning their OPD work between January and March, and will begin site visits in May. The audit report is expected to be available in October 2008, after which Chief Hood will have an opportunity to respond. The audit may include personal services, contracted services, operating expenses, compliance with laws, and regional operations. Ms. Erdahl expects the audit team to visit at least some of the OPD offices throughout the state.

- *2009 Biennium Operation Guidance*

Budget Director David Ewer said that he appreciates the Public Defender Commission's passion for their mission and willingness to work through the bumps with the governor's office. He said that OPD's clients have an entitlement to state funded services but cautioned that other state agencies have clients with similar entitlements. He said that the

political reality is that we live in a world with limited resources. He thinks that OPD ended up with an adequate budget for the biennium, but he is always worried about the next budget cycle. Chairman Taylor and Mr. Ewer agreed that OPD got “a pass” during the last session due to the newness of the agency. Chairman Taylor said that while the Commission will not back off on any critical issues, they understand the fiscal limitations and will work to keep costs under control and to ensure that they are defensible.

Appellate Defender Program Report

Chief Appellate Defender Jim Wheelis reported on the number of current appellate cases (exhibit 12). Chief Wheelis said that a major expense each month is transcripts. Office Manager Sarah Braden has done heroic work to develop processes for transcript requests that will help control costs and ensure timely delivery. She has a good working relationship with the court reporters and spoke at their recent conference.

Kudos to Assistant Appellate Defender Joslyn Hunt, Al Avignone and the Bozeman Public Defender Office for their work that resulted in the Supreme Court upholding the rule regarding timeliness of the request for the death penalty.

Chairman Taylor asked how many appeals are handled by FTE versus contract attorneys. Chief Wheelis said that four of the last 18 went to contractors; he lets contract attorneys keep their cases on appeal if they choose to, though most don't. Chief Wheelis prefers to keep larger cases in-house to control costs, and sends out smaller cases if needed. For the most part, especially since the addition of a new paralegal, the FTE are able to keep up with the caseload. There were a substantial number of conflict cases early on with both Chief Wheelis and Ms. Hunt coming from the “other side,” but there is currently only one new conflict case. A breakdown of contract versus FTE cases will be included in future reports.

Reports, continued

- *CIMP Update*

IT Manager Teri Heiland updated the Commission on the Case Information Management Project (exhibit 13). Ms. Heiland introduced Heidi Henry, the project Operations Lead. Ms. Henry is currently bringing the four databases into alignment, ensuring that each office is entering the same data in the same way, regardless of which database they are using. “Just in time” training will occur through October as offices go live with the new system. There is also a plan for ongoing training to accommodate staff turnover. Ms. Heiland has copies of the JustWare contract for anyone who is interested.

A draft RFP for the final case management solution will be presented to the Commission after the first of the year. If OPD finds a better case management system through the RFP process, the costs will be included as a budget item for the next biennium, to be submitted in May 2008.

- *Training Coordinator Update*

Training Coordinator Eric Olson presented the FY 07 training report and the planned training programs for FY 08 (exhibit 14). Nearly 1,000 people attended training sessions in FY 07, covering numerous areas of concern to OPD. A broad range of topics will be addressed in FY 08 as well. In August there will be a joint training with the Montana Association of Criminal Defense Lawyers and the Federal Defenders of Montana as part

of an ongoing effort to collaborate with other entities when possible. There are several video conference sessions planned, and this year Mr. Olson will progress from one-way to two-way video interaction using MetNet. Moving away from the less expensive court system video locations will allow for a larger number of stations as well as more reliable service.

A large amount of high quality audio and video have been captured in past training sessions, most of which will be viable for several years, so the next step is to put it in library format. Mr. Olson expects to have a solid database of training sessions available for both staff and contract attorneys.

- *Mental Health Evaluation Protocol Update*

Mr. Olson reported in the absence of Dr. Laura Wendlandt. The purpose of the protocol is to facilitate appropriate service delivery at a reasonable cost. This will be accomplished by educating public defenders regarding when they need an expert and what services are required for a specific case; implementing a pre-approval process; developing cooperative working relationships with providers; and setting standard fees for services. A Memorandum of Understanding (MOU) for mental health experts (exhibit 15) will be required of all providers contracting with OPD; the MOU states that the provider agrees to abide by the protocol. Mr. Olson said that the current protocol should be seen as a foundation to build on as the protocol develops over time.

Commission Discussion – Eligibility/Fee Recovery/Contract Costs

Chief Hood reported that OPD indigence determination specialists are getting increasingly good at applying the eligibility standard as defined in the Determination of Indigence policy (exhibit 16). Chief Hood is also working on a payment agreement (exhibit 17) for clients that OPD has determined can pay for some portion of the services they received. Chief Hood said there is a significant difference between courts in assessing costs as a condition of sentence. She wants to ensure that judges first make a finding that a client can pay before OPD provides information on the cost of the defense. She also plans to meet with Ron Alsbury, Department of Corrections Probation and Parole Bureau Chief, regarding costs assessed as a condition of probation.

The new Memorandum of Understanding for contract attorneys (exhibit 18) includes a major change stating that claims submitted more than 45 days from the last day of the month of service will be denied. Late claim submissions (including some for the entire fiscal year that were received in July) made it impossible to anticipate the total contractor costs for FY 07. The federal defender system has become quite strict, and doesn't pay any claims older than 30 days. Although this is not a Commission decision, Chief Hood asked for Commission support in implementing the 45 day limit. The Commission agreed that the 45 day limit is reasonable.

A new fee schedule was also presented for discussion, including a reduced rate of \$30 per hour for travel time, and a standard two-tenths of an hour for basic motions. Currently OPD pays \$60 per hour for windshield time, plus mileage. Some of the travel issue is systemic; recruitment for contract attorneys across the state continues in an effort to reduce the amount of travel needed.

Chairman Taylor suggested putting "soft caps" (ordinary maximums) on certain kinds of cases, and provided Chief Hood with the federal rates as a basis to develop OPD caps. Incentives for contract attorneys were also discussed, including offering Lexis or Westlaw to contract attorneys

doing a certain number of OPD cases. A package of contractor incentives and limitations will be prepared for the October meeting.

Public Comment

Written (exhibits 19 and 20) and oral public comment were offered regarding the Mental Health Protocol.

Dr. Patrick Davis, a private practitioner from Great Falls, thinks that the protocol can use some fine tuning, and that it will help contain costs. He has concerns about the fee schedule, however, and suggested abandoning the fee per hour approach. He said that the current structure will result in losing high quality professionals, and OPD clients won't receive necessary services. Dr. Davis offered to brainstorm with OPD staff regarding other fee structures.

Dr. Michael Bütz, Aspen Practice P.C., is also concerned about the fee schedule and the quality of work that might result from the current structure. In addition, his claims have not been paid in a timely fashion. Dr. Bütz said that clinical practice and forensic work are apples and oranges. He distributed two handouts, guidelines for forensic psychologists and for child custody evaluations (exhibits 21 and 22). Commissioner Nardi asked Dr. Bütz what he thought an appropriate fee schedule would be. Dr. Bütz said that he already discounts his services to the state and that a range of fees should be implemented, but he did not offer a dollar value.

John Wilkinson, Executive Director of the Montana Chapter of the National Association of Social Workers, said that he has been in contact with Dr. Wendlandt, and his association is ready to work with OPD to further develop a good protocol that includes social workers. He thinks that one problem is the protocol doesn't define "mental health expert."

Tim Conley, Associate Professor of Social Work at the University of Montana, said that the written comments of Dr. Davis and his colleagues misrepresented the scope of practice of Licensed Clinical Social Workers (LCSW). He urged retention of the LCSW fees in the cost schedule, and thought that the provisional fees were reasonable.

Old Business/New Business (*Action Items)

There were no additional action items.

Future Meetings

The next meeting will be September 7 in Butte. Lexis and Westlaw will be invited to make presentations to the Commission. The October 11 meeting will be held in conjunction with OPD's annual training conference in Livingston.

Adjourn

The meeting adjourned at 2:20 p.m.

Exhibits 1 – 22 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>. Exhibits 23-24, which were distributed at the meeting but not discussed, are also available on the website.